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No. 87-814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TERMINAL REALTY PENN COMPANY,
Petitioner,

v.

SEYMOUR AUERBACH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF RESPONDENTS TERMINAL REALTY BALTIMORE COMPANY AND UNION STATION REDEVELOPMENT CORP.

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This memorandum is submitted in response to the notice from the Clerk of the Court dated January 6, 1988, requesting the filing of responses to the petition for a writ of certiorari.

Respondents Terminal Realty Baltimore Company (TRB) and Union Station Redevelopment Corporation (USRC) are two of the ten parties that were named as defendants in the complaint filed by respondent Auerbach. In March of 1986, the district court granted a motion to dismiss the complaint as to all parties on all

counts. The bases of the court's order were that (1) by virtue of 28 U.S.C. § 1498(b), the action was "required to be brought in the United States Claims Court with the United States as a party defendant," and (2) under Rule 19 of the Federal Rules of Civil Procedure, the United States is an indispensable party who has not been made a party to this action by plaintiff and who cannot be made a party to this action without depriving [the district] court of jurisdiction."

In the court of appeals, respondents TRB and USRC joined petitioner Terminal Realty Penn Company in arguing that the district court properly dismissed the complaint under 28 U.S.C. § 1498(b) and Fed. R. Civ. P. 19, and that the order should be affirmed. We also argued that the district court's action should be affirmed on the alternative ground that respondent Auerbach's claims are barred by an Agreement and Release that he signed in 1977. The court of appeals declined to resolve the latter issue, expressly limiting its decision to the interpretation of 28 U.S.C. § 1498(b) and reversing the district court's ruling on that point.

Respondents TRB and USRC agree with petitioner that the court of appeals incorrectly interpreted the statute. The court of appeals effectively redrafted the statute by distinguishing between "the sphere of the authorized activity" (in this case, the completion of the project, using respondent Auerbach's drawings) and the specific act of copyright infringement (the alleged copying of the drawings), and by concluding that the United States is liable only where the evidence "prove[s] the government's intention to accept liability for a specific act of infringement." In so ruling, the court has sharply curtailed the reach of the statute and greatly increased the exposure of private parties who contract to do work for the government. The opinion is inconsistent with the decisions of this Court and other federal courts, and the judgment should be reversed.

Respondents TRB and USRC join in the petition and support petitioner's request that a writ of certiorari be granted to review the decision and judgment of the court of appeals.

Respectfully submitted,

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Dated: February 5, 1988